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United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Fifty-first session
New York, 18-22 May 2015

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Legal issues relating to the use of electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Georgia (2015), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Poland (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016),

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Turkey (2016), Uganda (2016), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019). The term of the membership expires on the last day prior to the beginning of the annual session of the Commission in the year indicated in parentheses.

2. States, not members of the Commission, and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The fifty-first session of the Working Group will be held at the United Nations Headquarters in New York, from 18 to 22 May 2015. Meeting hours will be from 10.00 a.m. to 1.00 p.m. and from 3.00 to 6.00 p.m., except on Monday, 18 May 2015, when the session will be opened at 10.30 a.m.

4. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,[1] the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

Item 2. Election of officers

5. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Legal issues relating to the use of electronic transferable records

(a) Background information

6. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[2]

7. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr. 3), para. 381.

[2] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

mobile devices and electronic single window facilities, and to report on the discussions held at that colloquium.[3]

8. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions at the colloquium on electronic commerce (New York, 14-16 February 2011).[4] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[5] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the Rotterdam Rules.[6]

9. In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[7] However, as to the extension of the mandate of the Working Group to such topics as discrete subjects (and not incidental to electronic transferable records), the Commission agreed to discuss it at a future session.[8]

10. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on this subject (A/CN.9/737, paras. 89-91).

11. At the forty-fifth session of the Commission, in 2012, there was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[9] In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.[10] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records.[11]

12. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the legal issues relating to the use of electronic transferable records. At the outset, the Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field and it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). Thereafter, the Working Group considered various legal issues that arise during the life cycle of electronic transferable records

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[3] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[4] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

[5] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[6] Ibid., para. 235.

[7] Ibid.

[8] Ibid., para. 239.

[9] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

[10] Ibid.

[11] Ibid., para. 90.

(A/CN.9/761, paras. 24-89). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

13. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began its consideration of the draft provisions as presented in document A/CN.9/WG.IV/WP.122. It was expressed that the rules enabling the use of electronic transferable records would interact with general provisions on the use of electronic transactions, and that further harmonization of those general provisions would be highly desirable (A/CN.9/768, para. 15). As to future work, it was noted that although it was premature to discuss the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved (A/CN.9/768, para. 112).

14. At its forty-sixth session, in 2013, the Commission took note of the progress being made by the Working Group with respect to electronic transferable records.[12] Recognizing that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records.[13]

15. At its forty-eighth session (Vienna, 9-13 November 2013), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.124 and its addendum. The Working Group also took into consideration the legal issues related to the use of electronic transferable records as presented in document A/CN.9/WG.IV/WP.125.

16. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and its addendum. The Working Group focused on the discussion on the concepts of original, uniqueness, and integrity of an electronic transferable record based on principles of functional equivalence and technological neutrality.

17. At its forty-seventh session, in 2014, the Commission took note of the Working Group's key discussions at its forty-eighth and forty-ninth sessions.[14] Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records.[15]

18. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and its addendum. The Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records, subject to a final decision to be made by the Commission (A/CN.9/828, para. 23). The Working Group also agreed that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for

[12] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 223-226.
[13] Ibid., paras. 227 and 230.
[14] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 141.
[15] Ibid., para. 149.

transferable records that existed only in an electronic environment. It further agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).

(b) Documentation

19. The Working Group will have before it notes by the Secretariat presenting the draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.132 and its addendum).

20. A limited number of the following background documents will be made available at the session:

- UNCITRAL Model Law on Electronic Commerce with Guide to Enactment;
- UNCITRAL Model Law on Electronic Signatures with Guide to Enactment;
- United Nations Convention on the Use of Electronic Communications in International Contracts;
- Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods;
- Draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.128 and Add.1);
- Report of Working Group IV (Electronic Commerce) on the work of its forty-ninth session (A/CN.9/804);
- Draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.130 and Add.1); and
- Report of Working Group IV (Electronic Commerce) on the work of its fiftieth session (A/CN.9/828).

21. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Technical assistance and coordination

22. In addition, the Working Group will hear an oral report of technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce.

Item 6. Other business

23. The fifty-second session of the Working Group is scheduled to be held in Vienna from 9 to 13 November 2015, those dates being subject to confirmation by the Commission at its forty-eighth session, scheduled to be held in Vienna from 29 June to 16 July 2015.

Item 7. Adoption of the report

24. The Working Group may wish to adopt, at the close of its session, on Friday, 22 May 2015, a report for submission to the forty-eighth session of the Commission scheduled to be held in Vienna, from 29 June to 16 July 2015. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting (on Friday afternoon) and subsequently incorporated into the report.

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Draft provisions on electronic transferable records

Note by the Secretariat

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[1]

2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the final form of its work (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.

5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record.

6. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30). Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/828, paras. 20-111).

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

II. Draft provisions on electronic transferable records

A. General

"***Draft article 1. Scope of application***

"1. This Law applies to electronic transferable records.

"2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a paper-based transferable document or instrument.

"[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

7. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

8. Draft paragraph 2 sets forth the principle that the draft Model Law does not affect substantive law applicable to paper-based transferable documents or instruments and to their electronic equivalents. Accordingly, it enables the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/797, para. 65). It also allows changing the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case ("blank endorsement") when permissible under substantive law (A/CN.9/828, para. 82).

9. Draft paragraph 3 aims at allowing the application of the draft provisions also to electronic transferable records that exist only in an electronic environment without interfering with their substantive law. Hence, paragraph 3 would not be necessary in jurisdictions where those electronic transferable records do not exist (A/CN.9/797, para. 17). The Working Group may wish to review this provision according to its decision on work priorities (A/CN.9/828, para. 30).

"***Draft article 2. Exclusions***

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.

"3. [This Law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

10. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

11. The Working Group may wish to discuss whether draft article 2, paragraph 1, should be retained in light of the fact that the draft Model Law does not affect substantive law, as set forth in draft article 1, paragraph 2.

12. As a reference, the Working Group may wish to compare the language used in the "Rome II" Regulation,[2] to exclude from the application of the Regulation "non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character". Therefore, it is understood that "other transferable documents, such as investment securities and loans"[3] fall within the scope of the Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Regulation.

13. Paragraph 3 reflects the view that certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

14. The Working Group may wish to consider whether paragraph 3 should be retained in the draft Model Law to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

"***Draft article 3. Definitions***

"For the purposes of this Law:"

Remarks

15. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition. The Working Group may wish to review the draft definitions once the draft articles of the Model Law had been fully considered and the use of the defined terms ascertained (A/CN.9/828, para. 66).

16. All references to "holder" in the draft provisions have been deleted and replaced with "person in control" (A/CN.9/804, para. 85). The Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] that entitles the person in control to claim the performance of the obligation [indicated] in the

[2] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199, 31/7/2007, pp. 40-49.

[3] See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

"*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.

Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.

Remarks

17. The definitions of "electronic transferable record" and "paper-based transferable document or instrument" reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control as well as the substantive rights of the person in control.

18. The definition of "electronic transferable record" does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft provisions.

19. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions and that the draft provisions should only focus on "transferable" documents (A/CN.9/797, paras. 27-28).

20. The Working Group may wish to consider whether the term "[indicated]" in square brackets in both draft definitions is appropriate or whether other terms might be used such as "represented by", "incorporated", "specified" or "contained" (A/CN.9/797, para. 22).

21. The Working Group may wish to take into account the definition of "electronic record" when considering the definition of "electronic transferable record".

22. The Working Group may wish to consider deleting the definition of paper-based transferable document or instrument as it concerns substantive law.

23. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, which is inspired by article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768, para. 34, and A/CN.9/797, paras. 25-26), bearing also in mind draft article 2,

paragraph 3. The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

"*electronic record*" means information generated, communicated, received or stored by electronic means [, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently]].

Remarks

24. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The bracketed text aims at highlighting the fact that information may be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). That bracketed text is also meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43). The Working Group may also wish to recall its discussion of "electronic record" with respect to draft article 10 (A/CN.9/828, para. 31).

"*issuer*" means a person that issues, directly or with the assistance of a third party, an electronic transferable record.

Remarks

25. The Working Group may wish to consider whether to retain the definition of "issuer" in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67). The term "issuer" appears in draft article 27 on retention and may be relevant for other provisions such as draft articles 12, on time and place of dispatch and receipt, 23 on change of medium and 24 on division and consolidation.

26. The words ", directly or with the assistance of a third party," aim at clarifying that when an electronic transferable record is issued by a third-party service provider upon the issuer's request, the third-party service provider is not considered an issuer under the draft provisions (A/CN.9/768, para. 33).

[*"control"* of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].]

Remarks

27. The draft definition of "control" has been placed in square brackets further to a decision of the Working Group at its fiftieth session made in conjunction with its consideration of draft article 17 on possession (A/CN.9/828, paras. 66-67).

"*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

Remarks

28. In considering the draft definition, the Working Group may wish to note its decisions to delete a draft provision on transfer (A/CN.9/828, para. 84) as well as a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85).

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 21.

Remarks

29. The Working Group may wish to consider whether to retain this definition in light of draft article 21 on amendment and of the remarks to that draft article. The term "amendment" occurs only in that draft article.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

Remarks

30. The Working Group may wish to consider whether to retain this definition in light of its substantive law implications. That draft definition refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22). The term "performance of obligations" appears in the definitions of "electronic transferable record" and of "paper-based transferable document or instrument".

"*obligor*" means the person [indicated] in a paper-based transferable document or instrument or in an electronic transferable record as having the obligation to perform [the obligation contained in that document, instrument or record].

Remarks

31. The definition of "obligor" has been reviewed in order to further clarify that it has only descriptive value and that substantive law shall determine who the obligor is. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that the notion may be defined under substantive law.

32. The term "obligor" appears in draft articles 19, 23 and 28, respectively on presentation, change of medium, and conduct of a third-party service provider. The Working Group may wish to consider the continued relevance of that draft definition in light of the final form of those articles.

33. If the definition of "obligor" is retained, the Working Group may wish to consider whether the term "[indicated]" is appropriate or whether other terms might be used (see also above, para. 20).

"*replacement*" means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

Remarks

34. The Working Group may wish to consider whether the draft definition should be retained in light of draft article 23 on change of medium. In that case, the Working Group may wish to discuss whether the draft definition should refer only to instances falling under the scope of draft article 23, or whether it should be broadened to include instances where an electronic transferable record was reissued to substitute for another electronic transferable record according to draft article 22 (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

> "*third-party service provider*" means a third party providing services related to [the use of] electronic transferable records [in accordance with articles 28 and 29]."

35. The words "[in accordance with articles 28 and 29]" were retained pending deliberations of the Working Group on those draft provisions.

36. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of "certificate service provider" contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

> "***Draft article 4. Interpretation***
>
> "1. This Law is derived from [...] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].
>
> "2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

Remarks

37. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

38. The notion of "general principles" contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that notion that has been most interpreted by case law.

39. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law. Those general principles may be contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

40. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognized as such. Moreover,

determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in the interpretation of the CISG and in adapting the CISG to evolving commercial practices and business needs.

41. The notion of "general principles" contained in draft article 4, paragraph 2, of the draft provisions refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence are general principles underlying the draft provisions. Other general principles might be identified as the work of the Working Group makes progress.

42. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant to define the notion of general principles contained in the draft provisions. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained, also in light of the fact that it is contained in several other UNCITRAL texts, including those on electronic commerce.

"***Draft article 5. Party autonomy [and privity of contract]***

"1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 1, 2, 4, 5, paragraph 2, 6, 7, [...], 28 and 29].

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

43. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

"***Draft article 6. Information requirements***

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

44. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

B. Provisions on electronic transactions

45. The Working Group at its forty-eighth session decided to retain draft articles 7-9 as a separate section (A/CN.9/797, para. 34). The Working Group may

wish to review its decision in light of the final form of the draft provisions as well as the content of those articles.

"***Draft article 7. Legal recognition of an electronic transferable record***

"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form."

Remarks

46. Draft article 7 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 7 in its current form (A/CN.9/804, para. 17, see also A/CN.9/768, para. 39).

"***Draft article 8. Writing***

"Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

Remarks

47. Draft article 8 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 18-19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). Draft article 8 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (ibid.). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38).

48. At the forty-ninth session, it was suggested that draft article 8 might not be necessary as the fulfilment of the functional equivalence of the "writing" requirement was implied in the definition of "electronic transferable record" in draft article 3. In response, it was stated that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to consider the desirability of maintaining draft article 8 in light of draft articles 10 and 11.

49. In case the draft provisions were to be applicable to electronic transferable records with no paper-based equivalent (see para. 9 above), the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 8, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

"***Draft article 9. Signature***

"Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

Remarks

50. Draft article 9 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, para. 20). It establishes the requirements for the functional equivalence of "signature" (ibid.) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46). It follows closely the text of article 9, paragraph 3, of the Electronic Communications Convention.

51. Reference in draft article 9, paragraph (b)(i), to "as reliable as appropriate" follows the approach adopted in article 9, paragraph 3, of the Electronic Communications Convention. This approach to a method "as reliable as appropriate" is distinct from the references contained in other draft articles to a "reliable method". It may also be distinct from the reference to a method "as reliable as appropriate" contained in draft article 17 since that draft article deals with functional equivalence of possession, which is not discussed in the Electronic Communications Convention.

52. The explanatory note to the Electronic Communications Convention provides guidance on the content and operation of that notion of "reliability" in the context of article 9, paragraph 3, of that Convention.[4] The Working Group may wish to confirm that the guidance provided in that explanatory note would be appropriate in interpreting draft article 9, subparagraph (b)(i).

53. In that respect, the Working Group may also wish to clarify whether the general reliability standard contained in draft article 11 would apply also to draft article 9, subparagraph (b)(i) (A/CN.9/804, para. 20).

54. Another option would be to include in draft article 9 text similar to the requirements set forth in article 6, paragraph 3, of the Model Law on Electronic Signatures, thus providing a specific reliability standard applicable only to draft article 9, subparagraph (b)(i). It should, however, be noted that the Working Group had already agreed that such "two-tier" approach would not be adopted in the draft provisions (A/CN.9/797, para. 40).

Remarks on "original"

55. After noting that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the

[4] United Nations, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, paras. 161-164.

prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for "original" in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of "control". It was further explained that the notion of "control" could identify both the person entitled to performance and the object of control (A/CN.9/804, para. 39).

C. Use of electronic transferable records

"Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

"1. Where the law requires the use of a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by the use of an electronic record if a method is employed:

(a) That is as reliable as appropriate, [to identify that electronic record as the electronic transferable record] [to identify that electronic record as the electronic record containing the authoritative information constituting the electronic transferable record] and to prevent the unauthorized replication of that electronic transferable record;

(b) To render that electronic record capable of being subject to control during its life cycle; and

(c) That is as reliable as appropriate, to retain the integrity of the electronic transferable record.

"2. The criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [legally relevant] [authorized] change that arises [throughout its life cycle] [from its creation until it ceases to have any effect or validity], has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

Remarks

56. Draft article 10 aims to offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 10 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of "control" would make it possible not to refer to the notion of "uniqueness", which posed technical challenges (A/CN.9/804, para. 38).

57. The Working Group agreed that reference to the definition of "electronic record" would suffice to provide for cases when, as it may happen in certain registry systems, there might be data elements that, taken together, provided the information

constituting the electronic transferable record, with no discrete record constituting the electronic transferable record (A/CN.9/828, para. 31).

58. Subparagraph 1(a) reflects the Working Group's discussion on the necessity to identify an electronic transferable record as the operative or authoritative electronic record (A/CN.9/828, paras. 32-35). The Working Group may wish to consider whether the definition of "electronic transferable record" in draft article 3 would suffice to ensure that an electronic transferable record produced legal effects and therefore render the qualification of an electronic transferable record as "authoritative" unnecessary.

59. Subparagraph 1(b) reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 55). The draft provision reflects the view that an electronic transferable record might not necessarily be subject to control, but should be capable of being controlled during its entire life cycle, particularly in order to allow for its transfer (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

60. At its fiftieth session, the Working Group agreed to insert a provision on the assessment of the reliability standard for the notion of integrity (A/CN.9/828, para. 49). That provision, which has been included as paragraph 2, indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes during its life cycle (as opposed to changes of purely technical nature) remains complete and unaltered (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the Model Law on Electronic Commerce.

61. The Working Group may wish to consider whether the words [legally relevant] [authorized] should be retained in light of its discussions on the desirability to record all or only selected changes, and on the difference between authorized and legitimate changes (A/CN.9/828, paras. 42-44; A/CN.9/804, paras. 30-32).

62. The words "[from its creation until it ceases to have any effect or validity]" are used in article 1(21) of the Rotterdam Rules (A/CN.9/828, para. 56).

63. At the Working Group's fiftieth session, it was said that subparagraph 1(a) should be assessed against general reliability standards (A/CN.9/828, para. 37) and that subparagraph 1(b) was not subject to a reliability test as draft article 17 provided the reliability standard to assess the method used to establish control (ibid., para. 38). The Working Group may wish to consider whether additional guidance is needed on the reliability standards applicable to subparagraphs 1(a) and (b).

64. The Working Group may wish to consider whether draft article 10 should be placed closer to draft article 18 relating to "control" (A/CN.9/804, para. 75).

"***Draft article 11. General reliability standard***

"1. The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances.

"2. In determining whether, or to what extent, a method is reliable [for the purposes of articles 10, 17 and ...], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(f) [Any agreement among the parties;]

(g) Any other relevant factor."

Remarks

65. Draft article 11 aims at providing a general reliability standard.

66. At the Working Group's forty-ninth session, different views were expressed with respect to the desirability of inserting such provision.

67. On the one hand, it was indicated that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was added that, while party autonomy could suffice to establish reliability standards in closed systems, there still was a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality (A/CN.9/804, para. 43).

68. Moreover, the inclusion of additional factors to assess reliability was suggested. Those factors related to: quality of staff; sufficient financial resources and liability insurance; existence of a notification procedure for security breaches and of reliable audit trails (A/CN.9/804, paras. 44-45).

69. However, at that session the view was also expressed that the existing and newly-suggested reliability factors were too detailed and that the provision was regulatory in nature. It was added that the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions (A/CN.9/804, para. 46).

70. In that same line, it was stated that the presence of a general reliability standard could hamper use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further indicated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context (A/CN.9/804, para. 42).

71. In conclusion, the Working Group agreed to further consider draft article 11 as a possible general rule on system reliability and in connection with provisions relating to third-party service providers. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method (A/CN.9/804, para. 49).

72. At its fiftieth session, the Working Group agreed to incorporate in draft article 11 text providing general guidance on the reliability standard (A/CN.9/828, paras. 47 and 49). That language, inspired also by article 17, paragraph 4, of the Model Law on Electronic Commerce, has been inserted as paragraph 1 of draft article 11.

73. Draft subparagraph 2(f) was inserted to highlight the relevance of any agreement of the parties when assessing reliability.

74. The Working Group may wish to discuss whether draft article 11, subparagraph 2(a), should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 10.

75. The Working Group may also wish to discuss whether draft article 11, subparagraph 2(b), should explicitly refer to unauthorized access and use of the system or of the method employed to establish control, in light also of draft article 17.

76. The following draft articles contain a specific standard for the assessment of reliability: draft article 9 on signatures, draft article 10, with respect to integrity, and draft article 17 on possession and control. The Working Group may wish to confirm that the general reliability standard contained in draft article 11 would also apply to those draft articles.

77. Draft articles 10, with respect to identification of the electronic record as the electronic transferable record and to prevention of the unauthorized replication of that electronic transferable record, 21 on amendment, 24 on division and consolidation, 25 on termination and 26 on use for security right purposes refer to the use of a reliable method. The Working Group may wish to confirm whether draft article 11 would suffice to assess the reliability of the various methods referred to in those draft articles. In that respect, the Working Group may also wish to clarify if additional guidance could be obtained from the standards contained in draft article 17 on functional equivalence of possession.

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Draft provisions on electronic transferable records

Note by the Secretariat

Addendum

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II. Draft provisions on electronic transferable records (*continued*)

C. Use of electronic transferable records (Articles 12-27)

"***Draft article 12. Time and place of dispatch and receipt of electronic transferable records***

["1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

"2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article.]"

Remarks

1. At the Working Group's forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69). The Working Group may wish to consider whether draft article 12, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records.

2. Moreover, the Working Group may wish to clarify which are the substantive law requirements with respect to the time and place of dispatch and receipt of a paper-based transferable document or instrument and what legal consequences are attached thereto.

3. In particular, the Working Group may wish to consider how draft article 12 could operate in registry systems where an electronic transferable record might circulate without being sent to or received at an electronic address. Existing practice

with respect to registry systems seems to rely on time-stamping services to record the availability of information in that system. In turn, the availability of information in the system may be the legally relevant moment according to substantive law or contractual agreement, regardless of that information being communicated.[1] On the other hand, practice based on substantive law may allow for the parties' agreement on relevant time, which would then not correspond to the moment when the event is recorded in the system.

4. The Working Group may also wish to consider whether draft article 12 would adequately address the matter in case of use of a token-based system. In that respect, the Working Group may also wish to specifically consider whether, in case of transfer of the electronic transferable record by transmission of its storage medium (e.g., USB key or smart card), the use of an electronic medium would pose specific challenges or if the rule contained in substantive law would apply.

5. An alternative draft of article 12 submitted for the consideration of the Working Group aims at enabling in an electronic environment the various possible options related to information on date and time.

> "***Draft article 12. Indication of time and place in electronic transferable records***
>
> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to an electronic transferable record."]

6. The Working Group may wish to consider replacing the words "originator" and "addressee" with the word "person in control" or other appropriate term. Alternatively, the Working Group may wish to consider defining the terms "originator", "addressee" and "electronic address". Moreover, the Working Group may wish to discuss the relationship between "originator", "issuer" and "transferor".

7. Draft articles 12 (alternative draft), 14, 20, 21, 22, 24, 25 and 26 refer to instances in which the law does not require, but permits a certain action, or may alternatively require or permit that action. At its fiftieth session, the Working Group agreed that the language used in those provisions should be revised to adequately accommodate functional equivalence rules both when the law requires a certain action and when the law permits it (A/CN.9/828, para. 80). The issue seems to arise from the fact that functional equivalence rules aim at meeting a legal requirement and are drafted accordingly.

8. One view is that where the law permits an action, that permission is still subject to certain requirements. Under that view, the language used to refer to a requirement to be met would apply in both instances, i.e. when the law requires an action and when the law permits an action subject to certain requirements. In that respect, reference to the words "or whether the law simply provides consequences" (contained, for instance, in article 8, paragraph 2, of the UNCITRAL Model Law on

[1] Recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry states that the registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Electronic Commerce — see also draft articles 9, 17 and 19 of the draft Model Law) could also be relevant. That view is supported by legislation enacting UNCITRAL texts.[2] Should the Working Group agree with that view, it may wish to consider inserting appropriate guidance in the materials illustrating the draft provisions.

9. An alternative draft could be based on the use of "may" to stress the enabling nature of the rule when introducing the requirements for functional equivalence. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, time or place may be indicated in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 41).

10. Another drafting option could follow the approach taken in draft article 14, paragraph 1, and use the words "this may be achieved". Such approach could offer the advantage of stressing the enabling function of the provision. Under that approach, the alternative text of draft article 12 could read as follows:

> ["Where the law requires [or permits] the indication of time or place with respect to a paper-based transferable document or instrument, this may be achieved in an electronic transferable record if a reliable method is employed."]

An alternative text of draft article 21 based on this approach is also provided (see below, para. 42).

> "***Draft article 13. Consent to use an electronic transferable record***
>
> "1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.
>
> "2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

11. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

> ["***Draft article 14. [Issuance of] multiple originals***
>
> "1. Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with

[2] For example, Section 18 of the Electronic Transaction Act of South Africa, 2002, on notarization, acknowledgement and certification, reads:
"(2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true reproduction of the document or information.
(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature."

respect to electronic transferable records by [issuance of multiple [operative] electronic records].

["2. The total number of multiple [operative] electronic records issued shall be indicated in those multiple records.]

["3. Where multiple [operative] electronic records have been issued, any requirement for presentation of more than one original of a paper-based transferable document or instrument is met by the presentation of one [operative] electronic record[, unless the parties have agreed otherwise].]"]

Remarks

12. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). It aims at enabling the possibility of issuing multiple electronic records, each controlled by a different entity, if so wished. However, it should be noted that some of the functions pursued with the issuance of multiple paper-based transferable documents or instruments might be achieved in an electronic environment, especially if based on a registry system, by attributing selectively control on one electronic transferable record to multiple entities.

13. The possibility of issuing multiple originals of a paper-based transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49). However, commentators on maritime transport law do not recommend this practice, unless absolutely commercially necessary, due to the possibility of multiple claims for the same performance based on each original. On the other hand, existing practice foresees the use of multiple electronic bills of lading.

14. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules") specifically allows for the issuance of multiple originals of negotiable transport documents. In particular, its article 47, subparagraph 1(c), sets forth that: "If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity". This rule, which applies to paper-based transport documents, reflects current practice. Article 47, subparagraph 1(c), of the Rotterdam Rules also deals with negotiable electronic transport records, but does not contain any provision for multiple negotiable electronic transport records.

15. Rule 4.15 of the International Standby Practices — ISP 98, dealing with "Original, Copy and Multiple Documents" allows for presentation of an electronic record, which "is deemed to be an 'original'", but does not contain any provision on presentation of multiple "original" electronic records.

16. Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP"), dealing with "Originals and Copies", sets forth that: "Any requirement of the UCP or a eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record". The commentary to that article explains that the concept of a full set of bills of lading is anachronistic in an electronic environment and would be satisfied by the presentment of a required electronic

record "unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted".

17. Paragraph 2 of draft article 14 contains a provision inspired by article 36, subparagraph 2(d), of the Rotterdam Rules and aims at informing all concerned parties of the number of operative electronic records in circulation. The Working Group may wish to consider whether such rule would be desirable in light of the specific features of electronic transferable records, or if such requirement should be satisfied only if already set forth in substantive law.

18. Paragraph 3 of draft article 14 contains a provision inspired by article e8 eUCP. The Working Group may wish to consider whether that paragraph should be retained and, if so, whether it should be placed in draft article 19 on presentation. The Working Group may also wish to consider whether the words "[, unless the parties have agreed otherwise]" should be retained to stress the possibility for the parties to agree on different modalities, or whether draft article 5 on party autonomy, applicable also to draft article 14, paragraph 3, would suffice.

19. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued on different media should be inserted in the draft provisions.

20. Draft articles 14 and 15 are the only draft provisions that explicitly refer to issuance (see A/CN.9/797, paras. 64-69).

> "***Draft article 15. Substantive information requirements of electronic transferable records***
>
> "Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument."

Remarks

21. Draft article 15 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding paper-based transferable document or instrument.

22. The Working Group may wish to clarify whether the information requirement contained in draft article 23(1)(b) (and the corresponding draft article 23(2)(b)), which aims at ensuring the perduring availability of information in case of change of medium, represents an exception to this rule.

> "***Draft article 16. Additional information in electronic transferable records***
>
> "Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

23. Draft article 16 states that an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument. In particular, some information could be included in an electronic

transferable record due to its dynamic nature but not in a paper-based document or instrument (A/CN.9/768, para. 66, and A/CN.9/797, para. 73).

"***Draft article 17. Possession***

"1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met with respect to an electronic transferable record if:

(a) A method is used to establish control of that electronic transferable record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic transferable record was [generated] [issued], in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"2. A person has control of an electronic transferable record if the method reliably identifies that person as the person in control."

Remarks

24. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67) and fiftieth (A/CN.9/828, paras. 50-56) sessions.

25. The Working Group may wish to consider whether the word "[generated]" or "[issued]" should be retained in light of their current use and possible substantive law implications (A/CN.9/828, paras. 52-54).

26. The Working Group may wish to clarify the relationship between draft article 17 and draft article 11, which contains a general reliability standard.

27. Draft paragraph 2 reflects the Working Group's decision at its fiftieth session (A/CN.9/828, paras. 64-65). In particular, it was explained that the adoption of such provision would make it possible for "control" to achieve the same result that "possession" of a paper-based transferable document or instrument brought (A/CN.9/828, para. 61); that reference to the person in control of the electronic transferable record does not imply that the person in control is also the rightful holder of that transferable record as this is for substantive law to determine (ibid.); and that reference to the person in control does not exclude the possibility of having more than one person in control (A/CN.9/828, para. 63). Moreover, it was stated that the electronic transferable record in itself did not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performed that function (ibid.). In this respect, it should be noted that identification should not be understood as implying an obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which imply anonymity (A/CN.9/828, para. 51).

28. The Working Group may wish to refer to the draft definition of "control" in draft article 3 when considering draft article 17 (A/CN.9/828, para. 66).

"***Draft article 18. Delivery***

"Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to an electronic transferable record through the transfer of an electronic transferable record."

Remarks

29. Draft article 18 reflects the deliberations of the Working Group at its fiftieth session (A/CN.9/828, para. 68).

30. The Working Group may wish to consider the sequence and placement of draft articles 18, 19 and 20 (A/CN.9/828, para. 75).

31. At the Working Group's fiftieth session, it was suggested that the definition of "transfer" of an electronic transferable record, which set forth that the transfer of an electronic transferable record meant the transfer of control over an electronic transferable record, and draft article 20, which established a functional equivalence rule for the endorsement of an electronic transferable record, should be more closely aligned (A/CN.9/828, para. 79). The Working Group may wish to consider whether that alignment should also involve draft article 18.

32. In that respect, the Working Group may wish to recall that transfer of an electronic transferable record might require under substantive law and contractual agreements both the functional equivalent of transfer of possession, i.e. delivery of a paper-based transferable document or instrument and the functional equivalent of endorsement of a paper-based transferable document or instrument. The Working Group may also wish to recall its decisions to delete a draft provision on transfer (A/CN.9/828, para. 84) as well as a draft rule conveying that transfer of control over an electronic transferable record was necessary to transfer that electronic transferable record (A/CN.9/804, paras. 82 and 85).

33. Under that approach, the Working Group may wish to consider the following alternative text of draft article 18:

["Where the law requires transfer of possession of a paper-based transferable document or instrument or provides consequences for the absence of transfer of possession, that requirement is met through the transfer of control over an electronic transferable record."]

34. The Working Group may wish to consider in conjunction with the alternative text of draft article 18 the deletion of the draft definition of "transfer" contained in draft article 3 also in light of possible conflicts with applicable substantive law.

"***Draft article 19. Presentation***

"Where the law requires a person to present for performance or acceptance a paper-based transferable document or instrument or provides consequences for non-presentation, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsements if required, for performance or acceptance."

Remarks

35. Draft article 19 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 73).

"***Draft article 20. Endorsement***

"Where the law requires or permits the endorsement in any form of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [indicating the intent to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

36. Draft article 20 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80).

37. The Working Group may wish to consider the substitution of the words "relating to the endorsement" with the words "[indicating the intent to endorse]" to better specify that the satisfaction of the generic requirements for writing and signature set forth in articles 8 and 9 should be accompanied by the expression of the intent to endorse.

38. The Working Group may wish to further consider the use of the words "[logically associated or otherwise linked to]" and "[included in]" in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) as well as of the definition of "electronic record" in draft article 3, and with a view to providing guidance on their uniform use throughout the draft provisions.

"***Draft article 21. Amendment of an electronic transferable record***

"Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, that requirement is met with respect to an electronic transferable record if a reliable method is employed for amendment of information in the electronic transferable record whereby the amended information is reflected in the electronic transferable record and is readily identifiable as such."

Remarks

39. Draft article 21 has been recast in light of the suggestions received at the Working Group's fiftieth session (A/CN.9/828, paras. 86 and 90). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended.

40. The word "readily" aims at introducing a stringent standard ensuring that users may easily distinguish amendments (A/CN.9/828, para. 88). In that respect, the Working Group may wish to clarify that the draft article does not intend to introduce a new information requirement.

41. An alternative text of draft article 21 under the "may" approach (see above, para. 9) could read as follows:

> ["Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, an electronic transferable record may be amended if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

42. Another alternative text of draft article 21 under the "this may be achieved" approach (see above, para. 10) could read as follows:

> ["Where the law requires or permits the amendment of a paper-based transferable document or instrument or provides consequences for the absence of an amendment, this may be achieved in an electronic transferable record if a reliable method is employed to reflect the amendment in that record and make it readily identifiable as such."]

43. In considering the standards for assessing the reliability of the method used for amendment of an electronic transferable record, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

> "***Draft article 22. Reissuance***
>
> "Where the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued."

Remarks

44. Draft article 22 reflects the Working Groups deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that, similar to paper-based transferable documents or instruments, electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original.

45. In that respect, the Working Group may wish to consider whether draft article 22 should be retained in light of draft article 1, paragraph 2.

> "***Draft article 23. Change of medium***
>
> "1. If a paper-based transferable document or instrument has been issued and the holder and the obligor agree to replace that document or instrument with an electronic transferable record:
>
> (a) The holder shall surrender the paper-based transferable document or instrument to the obligor;
>
> (b) The obligor shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and
>
> (c) Upon issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

"2. If an electronic transferable record has been issued, and the person in control and the obligor agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The person in control shall [surrender] [transfer] the electronic transferable record to the obligor;

(b) The obligor shall issue to the person in control, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) Upon issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Change of medium according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"4. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the electronic transferable record has not been issued for technical reasons, the paper-based transferable document or instrument may be reissued [or the replacing electronic transferable record may be issued].

"5. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the paper-based transferable document or instrument has not been issued for technical reasons, the electronic transferable record may be reissued [or the replacing paper-based transferable document or instrument may be issued]."

Remarks

46. Draft article 23 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102-103) and fiftieth (A/CN.9/828, para. 102) sessions.

47. Draft article 23 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced document or record would not further circulate (A/CN.9/828, para. 95).

48. The requirements set forth in subparagraphs (a), (b) and (c) of paragraphs 1 and 2 are concurrent and not sequential, and the parties are in a position to determine the most adequate sequence for meeting those requirements in light of all circumstances (ibid., para. 98).

49. With respect to the parties whose agreement is required for change of medium, the draft article requires for change of medium the consent of both obligor and person in control or holder. However, the Working Group may wish to note that obligor and issuer may not be the same party in bills of exchange (A/CN.9/828, para. 99). Moreover, under the current definition of "obligor" in draft article 3, the consent of the endorsers would also be required, thus involving a potentially high number of parties not necessarily affected by the change of medium (ibid.).

50. In that respect, the Working Group may wish to further note that prevailing practice, based on contractual terms applicable to registry-based systems, and existing law require only a request of the holder for change of medium and recognize only change from electronic to paper form (A/CN.9/828, para. 100). That approach takes into account the fact that parties involved in the change of medium could be obliged to comply with that request under substantive law if not already bound by contractual terms.

51. In light of the above, the Working Group may wish to consider whether making change of medium conditional only to the request of the holder would suffice. In doing so, the Working Group may wish to take into account draft article 13, requiring agreement to the use of electronic means, including implicitly or in general conditions. In that respect, the Working Group may also wish to consider whether that request of change of medium should be made to the issuer. Another possibility in that respect could be to grant the obligor to whom the document, or instrument or record is presented for performance the possibility to require a replacement at the time of presentation if dissatisfied with the medium in use at that time. The rationale for that rule is that the medium may become relevant for the obligor only at the moment of presentation.

52. Alternatively, the Working Group may wish to consider whether the agreement of the issuer should also be required, also in view of the suggestion to redraft the definition of "obligor" so as not to include endorsers (A/CN.9/828, para. 99).

53. The Working Group may wish to consider whether the word "[surrender]" or the word "[transfer]" should be used in draft subparagraph 2(a). The words "[of control]" have been deleted in light of the definition of "control" contained in draft article 3 (A/CN.9/828, para. 68).

54. Draft paragraphs 4 and 5 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but the corresponding record, document or instrument has not been issued for technical reasons. The Working Group may wish to consider whether such rule would be necessary, as it might not be contained in substantive law since it is specific to replacement due to a technical failure in a procedure involving an electronic transferable record. Alternatively, the Working Group may clarify whether such rule should derive from substantive law, and therefore be applicable to electronic transferable records by virtue of draft article 1, paragraph 2 (see also above, paras. 44-45).

55. The Working Group may wish to consider the relation between draft paragraphs 4 and 5 and draft article 22. The Working Group may also wish to consider the relevance of the use of the word "upon" in draft article 23 for the sequence of invalidation and issuance of documents, instruments and records.

56. The Working Group may wish to consider whether the word "[terminated]" is adequate for the purpose of draft paragraphs 4 and 5, which refer to instances where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in draft subparagraphs 1(c) and 2(c). The word "[invalidated]" might offer an alternative drafting option.

"***Draft article 24. Division and consolidation of an electronic transferable record***

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, an electronic transferable record may be divided or consolidated if:

(a) A reliable method is used to divide or consolidate the electronic transferable record; and

(b) The divided or consolidated electronic transferable record contains a statement identifying it as such.

"2. Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity."

Remarks

57. In light of the suggestions made at the Working Group's fiftieth session, draft article 24 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

58. The Working Group may wish to consider whether draft subparagraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

59. The Working Group may also wish to consider whether draft paragraph 2 should be retained, including for declaratory purposes, or deleted as it might interfere with substantive law.

60. In considering the standards for assessing the reliability of the method used for division and consolidation of electronic transferable records, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 25. Termination of an electronic transferable record***

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument or provides consequences for its non-termination, an electronic transferable record may be terminated if a reliable method is used [to terminate the electronic transferable record] [to prevent further [transfer][circulation] of the electronic transferable record]."

Remarks

61. Draft article 25 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, para. 106) and fiftieth (A/CN.9/828, para. 108) sessions. It now contains a general functional equivalence rule that follows the structure of similar rules dealing with requirement or possibility (see also above, paras. 7-10).

62. Draft article 25 aims at providing guidance on how termination could be achieved in an electronic environment. Draft article 23 of the Model Law contains a reference to termination of electronic transferable records.

63. The Working Group may wish to consider whether to retain the word "[circulation]" or the word "[transfer]" also in light of the definition of "transfer"

contained in draft article 3 and of the fact that at the Working Group's fiftieth session it was said that the reference to the word "[circulation]" was unclear (A/CN.9/828, para. 105).

64. In considering the standards for assessing the reliability of the method used for termination of an electronic transferable record, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 26. Use of an electronic transferable record for security right purposes***

"1. Where the law permits the use of a paper-based transferable document or instrument for security right purposes, an electronic transferable record may be used for those purposes if a reliable method is provided to allow the use of electronic transferable records for security right purposes.

"[2. Nothing in this Law affects the application of any rule of law governing security rights in paper-based transferable documents or instruments or electronic transferable records.]"

Remarks

65. In light of the suggestions made at the Working Group's fiftieth session, draft article 26 has been realigned with other functional equivalence rules (A/CN.9/828, para. 110).

66. Draft paragraph 2 has been inserted to clarify that the draft Model Law would not affect the substantive law governing security rights (A/CN.9/828, para. 111).

67. An alternative text of draft article 26, specifying the requirements for the perfection of security rights or interests upon an electronic transferable record, might read as follows:

[**"*Draft article 26. Perfection of security rights or interests upon an electronic transferable record***

"1. Where the law requires or permits perfection of a security interest on a paper-based transferable document or instrument [or provides consequences for its absence], that requirement is met with respect to an electronic transferable record:

(a) If the law requires [a qualified transfer, or] endorsement and delivery of the paper-based transferable document or instrument, with the transfer of control of the record and its endorsement [in accordance with [articles 18 and 20 of] this Law];

(b) If the law requires the amendment, or the amendment and signature of the paper document, with the amendment, or the amendment and the signature of the electronic transferable record [indicating the intent to perfect a security right] [in accordance with [articles 9 and 21 of] this Law].

"[2. Nothing in this Law affects the application of any other provision regulating security rights or interests that may be perfected upon an electronic transferable record or a paper-based transferable document or instrument.]"]

68. In considering the standards for assessing the reliability of the method used for the use of an electronic transferable record for security right purposes, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"***Draft article 27. Retention of [information in] an electronic transferable record***

"1. Where the law requires that a paper-based transferable document or instrument be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 10[, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information enabling the identification of the [issuer and person in control of the electronic transferable record] [parties] and [indicating the date and time [when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated]]] [of legally relevant events] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record [and indicating the date and time of their involvement] is made available].

"2. A person may satisfy the requirement referred to in paragraph 1 by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met."

Remarks

69. Draft article 27 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to take into consideration draft article 10, subparagraph 1(c) and paragraph 2, on integrity when discussing draft article 27.

70. The Working Group may wish to consider whether reference should be made to retention of an electronic transferable record in spite of the fact that the retained electronic record may no longer be transferred. In that respect, the Working Group may wish to consider making reference to the information contained in the electronic transferable record or, alternatively, to an "electronic record".

71. The words "], apart from any change that arises from the need to ensure that the record may not further circulate]" were added in subparagraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

72. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72). In particular, the words "[parties]" and "[of legally relevant events]" have been added in subparagraph 1(c) to capture all parties and events relevant during the life cycle of the electronic transferable record. References to the date and time of relevant events have also been added. The Working Group may wish to consider whether those drafting suggestions should be retained and, if so, whether the resulting subparagraphs 1(c) and 1(e) coincide in scope and operation. In that regard, the Working Group may wish to clarify, also in light of draft article 15, whether requirements on the information to be retained should be set forth in substantive law.

73. The Working Group may also wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

74. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft Model Law (A/CN.9/797, para. 104, subpara. (b), and A/CN.9/WG.IV/WP.124/ Add.1, para. 43). In that case, the Working Group may wish to clarify whether that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers (Articles 28-29)

"***Draft article 28. Conduct of a third-party service provider***

"Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify [the [issuer][obligor] and the person in control] [concerned parties];

(ii) That the electronic transferable record has retained its integrity and has not been compromised;

(iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(c) Use trustworthy systems, procedures and human resources in performing its services."

"***Draft article 29. Trustworthiness***

"For the purposes of article 28, subparagraph (c), in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable records;

(d) Availability of information to related parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and

(g) Any other relevant factor."

75. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 28 and 29 on third-party service providers had already been revised in light of the considerations expressed by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

76. The placement of these draft articles would depend on the final form of the draft provisions. In that respect, it was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

77. The words "[concerned parties]" have been added in draft article 28, subparagraph (d)(i), to require identification of all parties relevant during the life cycle of the electronic transferable record. That may be necessary, for instance, to ensure the possibility of an action in recourse.

78. The Working Group may wish to clarify the meaning of the term "relying party" in draft article 28 (A/CN.9/797, para. 107) also in view of the definition of "relying party" contained in article 2(f) of the UNCITRAL Model Law on Electronic Signatures.

E. Cross-border recognition of electronic transferable records (Article 30)

> "***Draft article 30. Non-discrimination of foreign electronic transferable records***
>
> "1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [in a foreign State][abroad][outside [the enacting jurisdiction]]], or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State][abroad][outside [the enacting jurisdiction]]], if it offers a substantially equivalent level of reliability].
>
> "2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

79. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[3] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

80. Draft article 30 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

81. The Working Group may wish to clarify if under draft article 30 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 30.

82. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words "[, if it offers a substantially equivalent level of reliability]" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

83. Paragraph 2 reflects the Working Group's understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

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[3] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.